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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-641

D. ALWYN STIVERS and WALTER B. CHERRY,

Petitioners,

vs.

STATE OF MINNESOTA; MINNESOTA STATE BAR ASSOCIATION, a Minnesota corporation; HENNEPIN COUNTY DISTRICT COURT; STANLEY KANE, as District Court Judge for the Hennepin County District Court; GARY FLAKNE, as County Attorney for the County of Hennepin; and WARREN SPANNAUS, as Attorney General of the State of Minnesota,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion below is reported at 575 F.2d 200 (8th Cir. 1978).

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was filed on May 3, 1978, and the mandate issued on May 30, 1978. On July 18, 1978, petitioners attempted to file a petition for Writ of Certiorari. It was rejected, apparently because of a failure to abide by Supreme Court printing requirements. On November 1, 1978, the respondents received notice that the petition for Writ of Certiorari had been docketed as of August 1, 1978. The jurisdictional basis is 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Should this Court review the decision of the United States Court of Appeals for the Eighth Circuit holding that the district court was correct in dismissing this case on the basis of *Younger v. Harris*, 401 U.S. 37 (1971) and progeny?

STATEMENT OF THE CASE

Procedural History

Petitioners D. Alwyn Stivers and Walter B. Cherry sued the Minnesota State Bar Association, the State of Minnesota, the Hennepin County District Court, Hennepin County Judge Stanley D. Kane, Hennepin County Attorney Gary Flakne and Minnesota Attorney General Warren Spannaus (hereinafter respondents; pursuant to 28 U.S.C. § 2201 and 42 U.S.C.

§ 1983, seeking declaratory and injunctive relief and damages from respondents on the ground that the Minnesota unauthorized practice of law statute, Minn. Stat. § 481.02 (1976), was unconstitutional.

Stivers and Cherry, as well as two other individuals, Charles and Donna Thibodeau, all members of the Board of Directors of the Divorce Education Association, filed suit in federal court against the respondents on October 29, 1975. The respondents moved to dismiss, and on September 9, 1976, a three-judge panel dismissed the plaintiffs' Complaint. *Thibodeau v. State of Minnesota*, 419 F. Supp. 87 (D. Minn. 1976). Although Charles and Donna Thibodeau did not appeal from that decision, Stivers and Cherry prosecuted an appeal. On February 22, 1977, this Court vacated the judgment of the three-judge panel and remanded the case for the entry of a "fresh order" so that an appeal could be taken to the Eighth Circuit Court of Appeals. *Stivers v. Minnesota*, 429 U.S. 1084 (1977).[1] On March 30, 1977, the district court entered a new judgment of dismissal pursuant to the court's previous Order of September 9, 1976. Petitioners Stivers and Cherry, two of the four original plaintiffs, appealed to the United States Court of Appeals for the Eighth Circuit and on May 3, 1978, the Eighth Circuit affirmed the decision of the district court, 575 F.2d 200 (8th Cir. 1978). The case is now before this Court on the petition for Writ of Certiorari filed by petitioners Stivers and Cherry.

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[1] In its brief order this Court cited MTM, Inc. v. Baxley, 420 U.S. 799 (1975). In Baxley, the Court held that an appeal to the Supreme Court from a three-judge panel does not lie where interlocutory or permanent injunctive relief has been denied and there has been no resolution of the merits of the constitutional claim presented.

Statement of Facts

Petitioners Stivers and Cherry, as well as Charles and Donna Thibodeau, are all members of the Board of Directors of a group calling themselves the Divorce Education Association. In March, 1974, the Minnesota State Bar Association filed suit in state court against Charles and Donna Thibodeau, the Divorce Education Associates, Inc., and various "John Does" alleging that they were engaged in the unauthorized practice of law in violation of Minn. Stat. § 481.02 (1976). Although there is apparently a technical distinction between Divorce Education Association and Divorce Education Associates, Inc., they are seemingly comprised of the same people and in the Complaint which was filed in the instant case, plaintiffs did not allege any distinction between the two groups.[2]

The case in state court was tried for over one month in early 1976 before Hennepin County District Court Judge Stanley Kane, one of the respondents herein. Subsequently, Judge Kane, in a lengthy and comprehensive opinion, found in part that the defendants in the state action had engaged in the unauthorized practice of law by assisting persons in preparing legal documents responsive to other pleadings; counselled persons involved in marital dissolution litigation as to their individual rights and as to the manner and method of filing legal documents; and that all of these activities were done for profit "by doing business as and through Divorce Education

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[2] The Bar Association ultimately also attempted to sue the Divorce Education Association but the Minnesota state district court held that it was, in effect, not amenable to suit since "to permit the [MSBA] to bring in the Association would be similar to permitting a plaintiff suing a department store to bring in the store's customers as defendants." Minnesota State Bar Association v. Divorce Education Associates, Inc., et al., No. 702526 (Hennepin County District Court, Order dated Feb. 5, 1975).

Associates, Inc., and Divorce Education Association during the years 1971, 1972, 1973, 1974, and 1975." *Minnesota State Bar Association v. Divorce Education Associates, Inc., et al.*, No. 702526. (Hennepin County District Court, May 12, 1976), Order at 3.[3] The Court further determined that the Minnesota statutes in question[4] were constitutional and, in a detailed order, enjoined the defendants therein from engaging in the unauthorized practice of law "on behalf of any person, firm, corporation or association." Order at 7. The court's injunction was carefully drawn and the court emphasized that it

> enjoined only that portion of defendants' conduct which is clearly subject to state regulation as the practice of law—the rendering of legal services and advice to a particular individual with respect to personal, specific questions or problems. Unfettered by the Court's injunction is defendants' right to assemble to exchange ideas and voice opinions pertaining to divorce, claimed incompetency within the legal profession or any other matter of concern to them.

Id. Memorandum of Law at 10.

The Court found that the members of the Divorce Education Association "receive legal counsel on a personal basis relating to specific legal matters." *Id.* Memorandum of Law at 10. The court determined that Charles and Donna Thibodeau were doing business as Divorce Education Association and that although the Association was not technically a party to

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[3] The Order and accompanying Memorandum of Law are included in the original record as filing no. 41. The Eighth Circuit Court of Appeals ordered this case heard on the original record.

[4] Minn. Stat. §§ 481.02 and 518.29 (1976).

the lawsuit, the Thibodeaus occupied the status of "representatives of the Association and that their defense of this action aired all relevant diverse interest affected by the action." *Id.* Memorandum of Law at 16.

The lawsuit in the instant case was filed in federal district court by the Thibodeaus and petitioners herein Stivers and Cherry in October, 1975 while the state case was pending. They sought an injunction against the state court trial; a declaration that the Minnesota unauthorized practice of law statute was unconstitutional and damages. The federal district court refused to enjoin the state court proceedings and ultimately dismissed the action based on the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) and progeny. *Thibodeau v. State of Minnesota,* 419 F. Supp. 87 (D. Minn. 1976), *vacated for a new order sub nom,* Stivers v. Minnesota, 429 U.S. 1084 (1977).

In the state court proceeding, defendants therein commenced a timely appeal but chose not to pursue it and the appeal was ultimately dismissed by the Minnesota Supreme Court for lack of prosecution. *Minnesota State Bar Ass'n. v. Divorce Education Associates, Inc., et al.,* No. 47155 (Minnesota Supreme Court, May 11, 1977).

REASONS FOR DENYING THE WRIT

THE DOCTRINE OF YOUNGER V. HARRIS IS CONTROLLING.

I. The Court Of Appeals Was Clearly Correct In Affirming The District Court's Dismissal Of This Action Under The Doctrine Of Younger v. Harris.

The Court of Appeals was unquestionably correct in upholding the district court's dismissal of this action based on the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. The initial posture of this action in federal district court included a request by petitioners herein for an order enjoining the ongoing state court proceedings. Although that particular request for relief is moot at this point, it is clear that this action remains a vehicle for the petitioners by which they seek to circumvent proceedings in the state appellate process. Petitioners' request for an order from the district court declaring Minn. Stat. § 481.02 (1976) unconstitutional and enjoining its enforcement served no purpose other than to invite the federal district court to intervene with the legitimate activity of the state judicial system.

The doctrine of *Younger v. Harris* firmly establishes that federal courts should not intervene in state court proceedings either by way of injunctive or declaratory relief except under extraordinary circumstances. *See Samuels v. Mackell*, 401 U.S. 66 (1971). While this rule was originally established in cases where federal intervention was sought in ongoing state criminal proceedings its application has been expanded to include civil proceedings. *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

In *Huffman v. Pursue, Ltd.*, this Court held that the *Younger* principles applied to an action for civil relief sought by the state against an operator of a theater displaying pornographic films since the action was closely related to a criminal prosecution. This Court reasoned that the state court defendant had an adequate remedy at law in the state forum; that the state courts were proper forums for the airing of constitutional principles; and that principles of federalism and comity mandated deference to the state court proceedings.

This Court, in *Trainor v. Hernandez, supra*, further broadened the application of the *Younger* rule to bar federal interference with strictly civil proceedings which were not of a quasi-criminal nature. In *Trainor*, the Illinois Department of Public Aid, pursuant to the Illinois Attachment Act, had sought civil remedies in state court against Welfare recipients who had allegedly received improper welfare payments. The defendants filed suit in federal court seeking a declaration that the Attachment Act was unconstitutional. This Court held that the principles of *Younger* applied because of the "eviscerating impact" which federal intervention would have on state enforcement actions. 431 U.S. at 446.[5]

It is thus clear that the *Younger* rule does not depend upon whether the state court proceedings are labelled "criminal" or, as in the case here, "civil." Rather, application of the doctrine depends upon the degree to which federal interference in state court proceedings would be destructive of the concepts upon which the *Younger* rule is based, i.e., equity, federalism and comity. As the *Younger* Court observed, the re-

[5] This Court further observed that the state officials could have proceeded criminally, although this fact was not critical to the ultimate decision. 431 U.S. at 444. In the instant case, the Minnesota unauthorized practice of law statute provides for both criminal and civil enforcement. Minn. Stat. § 481.02, subd. 8 (1976).

luctance to enjoin or otherwise impede the progress of a state court action is based upon

> . . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, supra, 401 U.S. at 43-44. *See Juidice v. Vail,* 430 U.S. 327 (1977); *Grandco Corp. v. Rockford,* 536 F.2d 197 (7th Cir. 1976); *Anonymous v. Ass'n of the Bar of the City of New York,* 515 F.2d 427 (2d Cir. 1975); *Goodrich v. Supreme Court of State of South Dakota,* 511 F.2d 316, (8th Cir. 1975); *Lynch v. Snepp,* 472 F.2d 769 (4th Cir. 1973), *cert. denied,* 415 U.S. 983 (1974).

In the instant case, federal intervention would unquestionably be destructive of the concepts of equity, comity and federalism and therefore application of the *Younger* rule is mandated. This is particularly true since the act in question, Minn. Stat. § 481.02 (1976), establishes both civil and criminal remedies against the unauthorized practice of law. Furthermore, regulation of the practice of law is a matter of the highest concern to the State of Minnesota and its citizens. The fact that the regulation of the practice of law is uniquely a function for the individual states has been explicitly recognized by this Court. *See Theard v. United States,* 354 U.S. 278 (1957); *Selling v. Radford,* 243 U.S. 46 (1917). Certainly the regulation of the practice of law is as important to Minnesota citizens as the pornography law in *Huffman* and the welfare fraud law in *Trainor* were to those respective states.

II. The Failure Of The Defendants In The State Court Action To Prosecute Their State Appeal Precluded The Court Of Appeals From Remanding The Case To The District Court.

Petitioners assert that since the state court proceedings have now been terminated, the principles of *Younger v. Harris* no longer apply. Their contention is based on the fact that the Minnesota Supreme Court dismissed their appeal on May 11, 1977, for lack of prosecution.

However, in contrast to petitioners' assertion, their obvious attempt to circumvent the state appellate process further demonstrates why the decision of the court of appeals was clearly correct. In *Huffman v. Pursue, Ltd., supra*, as noted above, the state brought nuisance proceedings against an operator of a theater displaying pornographic films. In that case, the operator, a state court defendant, did not appeal the state court judgment and instead filed a federal action seeking declaratory and injunctive relief in the federal district court. In federal court he argued that he failed to appeal on the grounds that such an appeal would be futile in light of previous state court decisions. The Supreme Court held that the defendant's failure to exhaust his state court appellate remedies prohibited the federal court from granting relief. The *Huffman* Court repeatedly emphasized the necessity of exhausting one's state appellate remedies. As the Court observed:

> Even assuming, *arguendo*, that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings.

420 U.S. at 606 (emphasis in original).

> * * *
>
> [A] necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*.

420 U.S. at 608. This Court made it clear that the exhaustion requirement was necessary so that state appellate courts would have an opportunity to fully hear and consider a litigant's case since

> it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. . . . In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts.

420 U.S. at 609. And this Court further observed that a litigant could not avoid the standards of *Younger* "by simply failing to comply with the procedures of perfecting its appeal [in state court]." 420 U.S. at 611 n. 22.

In the instant case, the state court defendants chose not to pursue their appeal to the Minnesota Supreme Court. As a practical matter, this is essentially the situation that existed in *Huffman v. Pursue* since in neither *Huffman* nor the instant case were the respective state appellate tribunals given an opportunity to consider the merits of the constitutional claims; an opportunity that the *Huffman* Court deemed to be absolutely critical. The exhaustion requirement of *Huffman* would be a mockery if litigants could so easily circumvent that requirement by merely filing an appeal but then not prosecuting it.

The court of appeals correctly determined that the *Huffman* principles militated against allowing petitioners the opportunity to circumvent the *Younger* strictures by failing to prosecute an appeal.

III. Petitioners' Contention That They Should Not Have Been Dismissed By The District Court Because They Were Not Named Defendants In The State Court Action Is Without Merit.

In their Petition for Writ of Certiorari, petitioners argue that since they were not individually named defendants in the state court action, the federal district court erred in dismissing their Complaint.

However, a review of petitioners' lengthy Complaint in the instant case reveals that they never presented to the district court their claim that they occupied a status any different than that of the other plaintiffs in the district court, *i.e.*, the Thibodeaus. Indeed, all of their allegations in the Complaint explicitly delineated the harm which they had jointly suffered. For example, count 1.2 of the Complaint alleges that

> Defendant, Minnesota State Bar Association, acting under color of law, and purporting to be an enforcer of M.S. 481.02, (the Unauthorized Practice of Law Statute) is acting and has acted, in concert with the above named defendants, in an attempt to prosecute an action against the above named plaintiffs, Charles T. Thibodeau and Donna Thibodeau, in the Hennepin County District Court, File No. 702526, *all to the injury and deprivation of rights of the plaintiffs* Charles T. Thibodeau, Donna Thibodeau, *D. Alwyn Stivers and Walter B. Cherry.*

(Emphasis added.)

Stivers and Cherry, in their Complaint, *never* mention or even tangentially suggest that the federal court should treat them any differently than the Thibodeaus.

However, if this Court decides to consider petitioners' new theory, raised for the first time before the court of appeals, of why they should not have been dismissed by the district court, it is clear that a review of the merits of their claims establishes that the Divorce Education Association was, in effect, legally indistinct from the state court defendants. Furthermore, even if it is determined that the Divorce Education Association through Stivers and Cherry are legally distinct from the state court defendants, they are all so closely related as to be bound by the *Younger* strictures.

The Minnesota state court determined that the Divorce Education Association as well as the Thibodeaus and Divorce Education Associates would be enjoined from violating Minn. Stat. § 481.02 (1976).

In effect, the Minnesota court found the Association's interests to be legally indistinct from those of the state court defendants; a conclusion not surprising in light of the fact that Stivers and Cherry along with the Thibodeaus are members of the Board of Directors of Divorce Education Association. The state court determined that the Thibodeaus occupied "the status of representatives of the Association and that their defense of this action aired all relevant diverse interests affected by the action." *Minnesota State Bar Ass'n v. Divorce Education Associates, Inc., et al., supra,* Memorandum of Law at 16.[6] The proper remedy at that juncture of the case, if petitioners disagreed with the state court decision, was to prosecute an appeal to the Minnesota Supreme Court or otherwise challenge

[6] Furthermore, as noted above, in their Complaint and at the district court herein, Stivers and Cherry actively joined with the Thibodeaus in an attempt to enjoin the state court action.

the court's order in state court. Bringing the issue directly to the federal forum was in direct contravention of the *Younger* strictures.

Significantly, in their own pleadings at the district court, Stivers and Cherry did not allege any distinction between Divorce Education Association and Divorce Education Associates, Inc. and, indeed, repeatedly referred to the Divorce Education Association as the target of the state court action.[7]

Even if Divorce Education Association through Stivers and Cherry is considered to be legally distinct from the state court defendants for the purpose of the federal action, the *Younger* bar is applicable nevertheless.

The fact that a federal plaintiff is distinct from a state court defendant does not allow that plaintiff to escape the *Younger* bar when, as is present here, the interests of the two are inextricably intertwined. *Hicks v. Miranda,* 422 U.S. 332, 348 (1975). In *Hicks,* this Court held that a theater owner, his property holding company, and the theater corporation could not avoid the *Younger* doctrine by challenging a California obscenity statute in the federal courts when state proceedings had already been initiated against two of the theater's employees under the obscenity statute. Such federal intrusion would impermissibly interfere with the state courts so as to offend principles of comity and federalism. *See Hicks v. Miranda,* 422 U.S. at 349. In some situations a federal plaintiff may escape the *Younger* doctrine if similar proceedings have been instituted against a completely unrelated defendant, *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975). However, that situation obviously is not present here.

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[7] *See, e.g.,* petitioners' undated "Memorandum of Law On Behalf of Plaintiffs" filed on about November 14, 1975, and "Plaintiffs' Memorandum" dated November 20, 1975.

In the instant case, it is clear that the interests of Stivers and Cherry are intertwined with the interests of the Thibodeaus, the state court defendants and two of the plaintiffs herein, and thus Stivers and Cherry should not be allowed to avoid the *Younger* bar. The plaintiffs in the federal action (the Thibodeaus and Divorce Education Associates) are so closely related as to be virtually indistinguishable. The central figures in the Divorce Education Associates were the Thibodeaus and it is clear that their representation and interest was equally as significant as for Divorce Education Association. *See Minnesota State Bar Association v. Divorce Education Associates, Inc., et al., supra,* Memorandum of Law at 15-17. Stivers, Cherry and the Thibodeaus were all members of the Board of Directors of the Divorce Education Association. Thus, there was unquestionably an identity for purposes of "control and management." *Doran v. Salem Inn, Inc., supra,* 422 U.S. at 929. Furthermore, as discussed above, Stivers and Cherry joined with the Thibodeaus in the federal district court action seeking not only a declaration that Minn. Stat. § 481.02 be declared unconstitutional but also that the ongoing state proceedings be enjoined on the grounds that they would suffer irreparable injury if the state court case proceeded.

The petitioners' charade whereby they now attempt to disassociate themselves from the state court defendants is an obvious attempt to circumvent the clear applicability of the *Younger* doctrine. Chief Justice Burger rebuked such an attempt in *Allee v. Medrano,* 416 U.S. 802 (1974).[8] Referring to a claim by a union that *Younger* did not apply to it on grounds that it was the members of the union and not the union itself that had been defendants in the state court action, the Chief Justice stated:

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[8] The opinion was a partial concurrence and a partial dissent and was joined in by Justices White and Rehnquist. The majority opinion did not address the Younger issue.

> The same comity considerations apply whether the action is brought in the name of the individually arrested union member or in the name of the union, and there is no inequity in requiring the union to abide by the same legal standards as its members in suing in federal court. . . . Any other result would allow the easy circumvention of Younger by individuals who could assert their claims of First Amendment violations through an unincorporated association of those same individuals if the association is immune from Younger burdens. . . . The requirements of Younger are not to be evaded by artificial niceties.

416 U.S. at 831-33. *See also Hicks v. Miranda, supra.*

Thus, petitioners' claim that they should be able to avoid *Younger* is clearly untenable in light of the considerations that underlie the *Younger* doctrine itself. The interests of the petitioners in the federal claim and those of the state court defendants are absolutely identical. It is obvious that if the *Younger* doctrine can be avoided so easily the state will be severely inhibited and frustrated in effectuating its enforcement procedures, *see Trainor v. Hernandez, supra.* Thus, comity and federalism dictate that petitioners here seek their appropriate redress in the state courts and not in the federal forum.[9]

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[9] It should be emphasized that the petitioners had a full and fair trial on the validity of their constitutional claims in the state court proceedings. The trial lasted over one month and the exhaustive state district court order and memorandum of law both reflect considerable research and analysis. Thus, the relitigation of those claims by way of a section 1983 action in federal court should be barred by *res judicata* and collateral estoppel. *See* Huffman v. Pursue, Ltd., *supra,* 420 U.S. at 606 n. 18; Stone v. Powell, 428 U.S. 465, 493-94 n. 35 (1976); Vestal, State Court Judgment As Preclusive In Section 1983 Litigation In A Federal Court, 27 Okla. Law Review 185 (1974); Note, Developments In The Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1336-37 (1977).

The petitioners have had their day in court. They have attempted, unsuccessfully, to have the federal judiciary interfere with ongoing state proceedings and to relitigate issues decided in state courts. The decision of the court of appeals is fully consistent with decisions of this Court. The decision below in no way conflicts with any other court of appeals' decision of which the respondents are aware. The decision is well-reasoned and does not address issues which warrant further review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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